IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Since our petition sets forth fully the considerations that support the grant of certiorari in this case, in this reply we merely underscore the principal errors of omission and commission in respondent's brief in opposition.[1]

1. The quality of respondent's arguments is typified by respondent's effort to distinguish *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969), the decision that the Court of Appeals in the case at bar found squarely in conflict with its own. Respondent charges the

[1] We pass over respondent's lengthy statement of facts, not because it is accurate, but because it is for the most part irrelevant. The only relevant facts are those stated in the Court of Appeals' opinion, from which the statement in our petition is drawn.

court below with "an obvious inadvertent misinterpretation of the *Piedmont* case" (Opp. p. 28). Respondent contends, contrary to the view of the court below, that the Fourth Circuit in *Piedmont* did not hold that a violation of Section 2 First would support a strike injunction, but that rather the Fourth Circuit's view in that respect was simply dictum (Opp. pp. 28-30). Respondent says that is so because the Fourth Circuit instructed the District Court to consider, on the hearing on the final injunction, not only whether the union had violated Section 2 First but also whether the dispute was a "minor dispute" as to which the union would not in any event be entitled to strike.

Respondent's conception of "dictum" and "holding" is strange. In *Piedmont*, the Court of Appeals commenced its opinion by noting that "the district court . . . granted an interlocutory injunction restraining its pilots from continuing a strike," and by then stating, "we affirm the district court." 416 F.2d at 635. The preliminary injunction thus affirmed by the Court of Appeals had been granted on the ground that the union had probably "failed to negotiate in good faith" and thereby violated Section 2 First. *Id.* at 637. Accordingly, the Court of Appeals was called upon to decide, and did decide, whether the district court had jurisdiction to enter an injunction on that ground. It did not refrain from deciding the issue and remand the case for the district court to consider whether the preliminary injunction could be based upon a finding that the dispute was a "minor" dispute. It simply instructed the district court to consider that possibility when the time came for entry or denial of a *permanent* injunction. All of this is perfectly clear from the Fourth Circuit's opinion. It is respondent, not the court below, that has fallen into an "obvious inadvertent misinterpretation" of that opinion.

2. As to respondent's discussion of this Court's decisions (Opp. pp. 15-27), there is no need to add to what we have already said. We simply point out again that in *Virginian Ry. v. System Federation*, 300 U.S. 515, 544-545 (1937),

this Court explicitly declined to follow *Pennsylvania R.R. System Federation v. Pennsylvania R.R.*, 267 U.S. 203 (1925), which had held that the predecessor of Section 2 First was not justiciable. Instead, as respondent concedes (Opp. p. 25), this Court affirmed an injunction which "incorporated" the requirements of Section 2 First; and in so doing this Court expressly rejected the argument that Section 2 First is not justiciable. It is of course true that *Virginian* did not involve a strike injunction. But it did involve an injunction which could not have been sustained in full if, as respondent urges and the court below held, Section 2 First is not justiciable. And *Virginian* has never been overruled or even questioned in this Court's subsequent opinions. To the contrary, it has been endorsed (Pet. pp. 21-23).[2]

3. Respondent devotes some 17 pages (Opp. pp. 32-49) to an attempt to distinguish the lower court cases in addition to *Piedmont* that we cited in our petition as being contrary to the decision below respecting the justiciability of Section 2 First. Those cases are accurately described in our petition, and we will not extend the pleadings by repeating those descriptions. We simply make the the following observations. First, the bulk of respondent's lengthy discussion seems designed to show that many of these cases did not involve strike injunctions. That, of course, is quite true, as we made clear in our petition. However, each of them did involve in one way or another the question whether Section 2 First is justiciable; and taken together the cases constitute an impressive body of authority for the proposition that that provision is justiciable. Respondent does not, and cannot, show the contrary, no matter how microscopically the cases are examined. Second,

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[2]The decisions collected by respondent in which this Court has held that the parties may engage in "self-help" after the requirements of the Railway Labor Act have been exhausted (Opp. pp. 26-27) did not, of course, involve the question whether compliance with Section 2 First is one of those requirements.

a number of the cases did involve strike injunctions issued after exhaustion of the formal procedures of the Act (Pet. pp. 13-14, 15). As to some of these decisions, respondent, while conceding that such injunctions were issued, maintains that the justiciability of Section 2 First "was not considered or decided in any of those cases" (Opp. p. 44). But the opinions, which are quoted in part in our petition (pp. 15-16), clearly show that respondent is wrong on that score. Third, respondent is also wrong in asserting that in other decisions of this sort cited in our petition the courts "reached no conclusion on the issue of good faith bargaining by the union" (Opp. p 39). In that category, for example, respondent places *International Ass'n of Machinists v. National Railway Labor Conference*, 310 F. Supp. 905 (D.D.C. 1970) (Pet. p. 13, Opp. p. 39). Here again, we simply invite the Court's attention to the opinion in that case, in which after a detailed analysis the court concluded:

> "The duty laid out in Section 2 First is 'the heart of the Railway Labor Act.' *Railroad Trainmen v. Terminal Co.*, supra, 394 U.S. at 377-378, 89 S. Ct. at 1115. By initiating and negotiating the dispute on an obligatory national basis and then striking the carriers on an individual basis it seems clear that the unions have violated their duty to 'exert every reasonable effort to make . . . agreements . . . and settle disputes.' Having begun on a national basis, it is incumbent upon the parties to continue to deal on a national level even after the procedures of the Railway Labor Act have been exhausted. To act otherwise would take on the character of bad faith bargaining." *Id.* at 912.

3. Finally, we note that respondent does not touch upon the legislative history supporting the justiciability of Section 2 First (Pet. pp. 25-26), or upon the legislative history that demonstrates that the Congress did not intend the National Mediation Board to be put in the position of adjudicating questions of bad faith bargaining (Pet. pp. 30-33), or upon the administrative practice of the Board that shows it has never undertaken to make that sort of determination

(Pet. pp. 28-30). Each of these considerations strongly supports our petition.

Conclusion

For the reasons stated herein and in the petition, certiorari should be granted.

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Respectfully submitted,

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